Nos. 82-966, 82-1711 and 82-1771

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1983

COMMONWEALTH OF MASSACHUSETTS, *Petitioner,*

—v.—

OSBORNE SHEPPARD, *Respondent.*

STATE OF COLORADO, *Petitioner,*

—v.—

FIDEL QUINTERO, *Respondent.*

UNITED STATES OF AMERICA, *Petitioner,*

—v.—

ALBERTO ANTONIO LEON, ET AL., *Respondents.*

## BRIEF AMICUS CURIAE OF DAN JOHNSTON COUNTY ATTORNEY POLK COUNTY, IOWA, IN SUPPORT OF RESPONDENTS

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## INTEREST OF AMICUS CURIAE

Amicus Curiae, as the duly elected County Attorney of Polk County, Iowa, encompassing the City of Des Moines, is charged with the principal responsibility for the prosecution of criminal offenders in Polk County, Iowa. In Illinois v. Gates, 81-430, amicus, as a concerned law enforcement official, filed a brief amicus curiae opposing the introduction of a good faith exception to the exclusionary rule. Amicus argued in Gates that the exclusionary rule provides a significant impetus toward adherence to Fourth Amendment values in the day to day administration of the criminal justice system. Rather than serving as an impediment to effective law enforcement, amicus has found the costs to public safety of the exclusionary rule virtually non-existent and has perceived

the rule as a principal contribution to increased police professionalism and training. Moreover, the proposed good faith exception to the exclusionary rule would inject new and difficult factual issues into the routine administration of the criminal justice system which would increase the resources needed to dispose of a case without providing additional protection against crime.

Amicus believes that pre-occupation with the politically charged issue of the exclusionary rule fosters the dangerous illusion that crime can be reduced by watering-down our constitutional heritage. In the opinion of amicus, the misplaced attempt to use the Constitution as a scapegoat for crime diverts attention and scarce resources from programs such as police training and penal reform which might, in fact, reduce crime. In the belief that the exclusionary rule

serves a critical educational and prophylactic role without posing a serious threat to the effective prosecution of crime and that its weakening would undermine constitutional liberty without alleviating our crime problem, amicus respectfully submits this brief amicus curiae.

ARGUMENT*

Two former members of this Court served as law enforcement officials for substantial periods of time prior to their respective appointments. Chief Justice Warren's service as an effective and energetic state prosecutor provided him with more first-hand experience in law enforcement than any Justice in the Nation's history. Justice Clark's service as Assistant Attorney General in charge of the

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*Letters of consent to the filing of this brief amicus curiae have been granted by the parties in Colorado v. Quintero; United States v. Leon; and Massachusetts v. Sheppard and have been lodged with the Court

Criminal Division and as Attorney General provided him with valuable insight into the particular complexities of Federal law enforcement. Though each harbored initial skepticism concerning the exclusionary rule, Chief Justice Warren joined Justice Clark's opinion for the Court in Mapp v. Ohio, 367 U.S. 643 (1961) because both came to recognize that the exclusionary rule had not affected their ability to prosecute crime while serving as a critical reinforcement of Fourth Amendment values.

Justices Warren and Clark came to understand, in part through their experiences as prosecutors, the unique role played by the exclusionary rule in establishing respect for the Fourth Amendment within the law enforcement community. Similarly, as a modern day prosecutor, amicus has come to regard the exclusionary rule as a linchpin of enlightened

and effective law enforcement.

## I. THE EXCLUSIONARY RULE DOES NOT ACT AS A SUBSTANTIAL IMPEDIMENT TO THE CONVICTION OF THE GUILTY

Of the 12, 474 cases prosecuted in Polk County, Iowa, between July 1980 - September 1983, only 24 cases, including 15 arrests for possession of controlled substances such as marijuana, were dismissed because of the exclusionary rule.

The success of Polk County law enforcement officials in providing effective law enforcement while complying with Fourth Amendment values is attributable, first, to the growth of a professionalized law enforcement

system in which police officers are trained to respect the Fourth Amendment while pursuing investigative techniques which deal effectively with crime; and, second, to the precision with which this Court has restated governing Fourth Amendment principles over the last 15 years. The recognition of a good faith exception to the exclusionary rule would jeopardize both factors.

Polk County's experience is reflected by recent studies of the impact of the exclusionary rule on law enforcement. Eg. W. LaFave, Search and Seizure, § 1.2., n.9. (1981 Supp.); Brosi, A Cross-City Comparison of Felony Case Processing, (INSLAW 1979). As law enforcement authorities have gained a greater understanding of their responsibilities under the Fourth Amendment -- in large part because of pressures generated by the exclusionary rule -- the incidence of Fourth Amendment

violation has steadily decreased until, today, it does not play a substantial role in the prosecution of crimes against persons or property. Thus, in Nardulli, The Societal Cost of the Exclusionary Rule: An Empirical Assessment, 1983 American Bar Foundation Research Journal, No 3 (forthcoming), 7,500 felony prosecutions in 9 mid-sized counties in Pennsylvania, Michigan and Illinois were studied. Nardulli reports that although motions to suppress were brought in approximately 5 percent of the cases, only 52 motions were granted, resulting in the loss of 40 cases -- or 0.6 percent of the felony prosecutions. Morever, the successful motions were concentrated in the narcotics possession area, leaving the prosecution of crimes against persons or property virtually untouched by the exclusionary rule. Finally, of the few defendants freed because of the

rule's operation, Nardulli points out that fully two-thirds, if convicted, would have received sentences of less than two months, while only one could have expected a sentence of more than one year. See also, Davies, What We Know (And Still Need to Learn) About the Costs of the Exclusionary Rule: A Hard Look at the NIJ Study and a Review of Other Research, 1983 American Bar Foundation Research Journal, No. 3 (forthcoming). Thus, the Nardulli study merely confirms the experience of amicus in Polk County that careful training and good police work have combined to render it possible to have both effective law enforcement and strict compliance with Fourth Amendment norms. Such a degree of police professionalism was not, however, attained without cost and substantial effort. In the experience of amicus,

the existence of the exclusionary rule has acted as the principal encouragement of police training and professionalization. The realization that untrained police would produce arrests which would not stand up to a motion to suppress has led to a quantum upsurge in effective police training. Were the Court to recognize a good faith exception, the cost/benefit analysis of all police training programs would be re-cast. Indeed, such a rule might place a premium on police ignorance -- so long as it were "reasonable" ignorance. The net result would be an inevitable decline in police training and a consequent loss in productivity.

While increased training has played an important role in the decline of Fourth Amendment violations, this Court's success in articulating bright-line common sense norms

governing search and seizure has allowed both police and prosecutors to gauge with increasing certainty their Fourth Amendment obligations and to engage in effective law enforcement free from unduly technical constraints. Thus, by simplifying the area of the Fourth Amendment over a fifteen year period, the Court has expanded the range of clearly permissible activity and drastically reduced the need for a good faith exception. For example, in Terry v. Ohio, 392 U.S. 1 (1968) and Sibron v. New York 392 U.S. 40 (1968), street stops and defensive frisks were upheld on less than probable cause; in Schneckloth v. Bustamonte, 412 U. S. 218 (1973) an expansive definition of consent searches was adopted; in United States v. Robinson, 414 U.S. 218 (1973) and Gustafson v. Florida, 414 U.S. 260 (1973), broad power to search incident to

a lawful arrest was recognized; in South Dakota v. Opperman, 428 U.S. 364 (1976), and United States v. Ross, 102 S. Ct. 2157 (1982) inventory searches of the contents of automobiles were broadly authorized; in United States v. Miller, 425 U.S. 438 (1976) and Smith v. Maryland, 442 U.S. 735 (1979) broad areas of investigative searches were removed from Fourth Amendment scrutiny; in Rakas v. Illinois, 439 U.S. 128 ( 1978), United States v. Salvucci, 448 U.S. 83 (1980) and Rawlings v. Kentucky, 448 U.S. 98 (1980), standing to assert 4th Amendment violations was dramatically narrowed; and in United States v. Calandra, 414 U.S. 338 (1973) , the Grand Jury process was exempted from the exclusionary rule. Most significantly, in Hill v. California, 401 U.S. 797 (1971) and Franks v. Delaware, 438 U.S. 154 (1978), the Court stressed that

understandable factual errors do not undercut a finding of probable cause. Finally, in Illinois v. Gates, __ U.S. __, 103 S.Ct. 2317 (1983), the Court permitted probable cause to be found on the basis of an anonymous informant's tip, so long as the "totality of the circumstances" gave rise to a "common sense determination that there is a fair probability of criminal activity." Such a flexible test, buttressed by the extremely generous reading given to law enforcement concerns by the Court during the last 15 years, makes the recognition of a good faith defense both unnecessary and potentially dangerous. Given the flexibility of the probable cause standard, the introduction of a good faith defense is merely an invitation to water down the probable cause standard, since the Court has already made it clear that reasonable mistakes of law or fact

do not preclude a finding of probable cause. Eg. Franks v. Delaware, 438 U.S. at 165. See also, United States v. Robinson, 414 U.S. 218 (1973); Draper v. United States, 358 U.S. 307 (1959). If a good faith exception is broader than the generous scope for mistake already inherent in the existing definition of probable cause, the concept of probable cause will be subject to a form of verbal reductionism which must rob it of any objective meaning. Thus, since the Fourth Amendment as construed by the Court does not interfere with effective law enforcement, and since the recognition of a good faith defense would dilute the substantive meaning of probable cause while removing much of the existing incentive for police training, amicus urges the Court to resist the invitation to create an unnecessary and expensive hole in the Fourth Amendment.

## II. THE EXCLUSIONARY RULE IS NECESSARY TO EMPHASIZE THE SERIOUSNESS OF OUR SOCIETY'S COMMITMENT TO FOURTH AMENDMENT VALUES

Police officers receive conflicting signals from the community. On the one hand, they are subjected to enormous -- and understandable -- pressures to prevent crime and to apprehend criminals; on the other hand, they are sternly admonished to conform their official behavior to limits established by the Bill of Rights. As with any group receiving conflicting signals, a suspicion may exist that one signal is to be ignored in the pursuit of the other. In the years prior to Mapp, the routine acceptance and use by many state courts of evidence gathered in violation of the Bill of Rights fostered the impression among segments of the law enforcement community that only lip service need be paid to the

restraining signals emanating from the Bill of Rights. The announcement by the Court in Mapp that the Fourth Amendment must be taken seriously was, thus, more than the mere establishment of a deterrent; it was a reinforcement and amplification of the signal that law enforcement in a free society is more complex than merely capturing the guilty. It was a firm admonition that even a worthy law enforcement end cannot justify an unconstitutional means. In the twenty-three years since Mapp, a generation of police officers has come to maturity in America, trained to recognize both sets of signals as meriting serious attention. It would constitute a law enforcement tragedy of the highest proportions if this Court were to weaken the signals which flow from the Bill of Rights when we are so close to achieving a professionalized law enforcement community.

This Court should harbor no illusions as to the psychological impact of a retreat from Mapp, whether couched in the rubric of good faith or some other protective wrapping. The signal to the law enforcement community, whether or not intended, would be a palpable one -- we no longer take Fourth Amendment as seriously. The inevitable result of such a signal must be a quantum upsurge in conduct violative of the Fourth Amendment. Amicus earnestly urges the Court not to send such a signal in the absence of persuasive evidence that the exclusionary rule as currently administered in fact constitutes a substantial impediment to the prosecution of crime.

## III. RECOGNITION OF A GOOD FAITH DEFENSE TO THE EXCLUSIONARY RULE WOULD INTRODUCE UNNECESSARY COMPLEXITY INTO THE CRIMINAL PROCESS AND WOULD ENCOURAGE POLICE TO REMAIN IGNORANT OF EVOLVING FOURTH AMENDMENT DOCTRINE

### A. The Good Faith Defense is Administratively Unworkable

As this Court has seen, the administration of a good faith defense is both time consuming and necessarily inexact. Thus, in grappling with the problems posed by a good faith defense to an action for damages for the violation of constitutional rights, this Court has been forced to consider, inter alia, allocation of the production and persuasion burdens, definition of the substantive standard, the probative force of relevant evidence and the possibility of derivative liability.

Even more difficult issues will be posed in the context of a suppression hearing where the central issue will become, not the substantive meaning of the Fourth Amendment, but the objective good faith of

the officer. As the Solicitor General correctly notes, it is, occasionally, a difficult task to determine what the Fourth Amendment requires, despite the matrix of precedent in which a case is embedded. It would, however, be far more difficult -- indeed it would be impossible -- to venture into wholly uncharted waters and explore the objective good faith of the officer. Every suppression hearing would necessarily become an inquiry into the training and knowledge of the arresting officer, to say nothing of the extent to which he had committed prior violations of the Fourth Amendment. The results would be wholly unpredictable and would require an extraordinary investment in time and resources.

### B. The Good Faith Defense Places a Premium on Ignorance

Under current standards, when this Court announces a clarification of Fourth Amendment doctrine -- for example, the decision in Delaware v. Prouse, 440 U.S. 648 (1979), clarifying the extent to which searches of automobiles could take place -- police officers possess a powerful incentive to understand the clarified rule in order to assure that their investigative practices do not violate the Fourth Amendment. Not surprisingly, therefore, the existence of the exclusionary rule has stimulated an extraordinary attempt by police officers to master Fourth Amendment doctrine. If, however, illegally seized evidence is admissible so long as the officer acted in good faith, police officials might well be better served by ignoring the

complexities of Fourth Amendment doctrine, trusting instead in their good faith to validate their investigative methods. Thus, if in the wake of Delaware v. Prouse, a police department studiously ignored the implications of the opinion, a police officer conducting a search in violation of that case might nevertheless be acting in good faith because he had never been informed of the case. While the notion of objective reasonableness places limits on willful ignorance, a good faith defense would place a premium on providing as little training as possible to satisfy minimum objective standards. Any additional training would be correctly perceived as creating unnecessary problems for the police. See Kaplan, The Limits of the Exclusionary Rule, 26 Stan L. Rev. 1027, 1044 (1971). See also, American Law Institute, 48th Annual Meeting, pp 374-98 (1971).

## CONCLUSION

For the above-stated reasons, this Court should reject the suggestion that illegally seized evidence may be admitted so long as it was seized in good faith.

Respectfully submitted

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